printed briefs, but do object to petitioners being permitted to proceed *in forma pauperis,* for the reasons set forth in respondents' answer and brief in opposition to petitioners' motion to this Court for leave to petition for writs of mandamus *in forma pauperis,* being No. 314 Misc. October Term, 1964, filed in this Court August 20, 1964.

This answer and brief will be restricted to answering petitioners' petition for a writ of certiorari itself filed September 24, 1965, and respondents submit that said petition should be denied.

Counter Statement of the Case.

Petitioners' statement of the case is incomplete and in many respects erroneous and inaccurate, and is in large part irrelevant to the questions raised by them, and therefore instead of correcting and supplementing it item by item respondents present their own complete counter statement of the case necessary to a determination of the questions raised by petitioners.

This action was originally commenced on February 1, 1952 in the District Court for the Southern District of California, Central Division, as a civil, private, treble damage suit brought by petitioner corporation against respondents herein and others, in which petitioner corporation sought recovery of damages for alleged violation of the antitrust laws in the amount of $800,000.00 before trebling. (Winckler & Smith Citrus Products Co. etc. v. California Fruit Growers Exchange, *et al.,* United States District Court, Southern District of California, Central Division, No. 13788.)

On March 20, 1952 petitioner corporation filed in the District Court a petition for its reorganization under

Chapter X of the Bankruptcy laws, and a trustee was appointed[1] in said Chapter X proceedings for petitioner corporation. (In the Matter of Winckler & Smith Citrus Products Co., Debtor, Case No. 53860, District Court of the United States, Southern District of California, Central Division.) The then trustee for petitioner corporation on April 30, 1952 filed a petition for leave to intervene in this action, and such petition was granted on April 30, 1952 by the District Court in said Chapter X proceedings. A similar petition was filed by the then trustee in the main action, and by order dated May 9, 1952 said trustee was permitted by the District Court to so intervene in the main action. Thereafter petitioner corporation and said trustee actively participated in the action.

A jury trial of the action resulted in a judgment in favor of petitioners and against respondents, entered March 5, 1956, in the sum of $1,692,500, plus costs in the sum of $705.54.

Respondents appealed from said judgment to the Court of Appeals for the 9th Circuit, which Court rendered its opinion filed September 30, 1960 affirming the judgment rendered on the jury's verdict on the issue of liability and reversing and remanding the judgment on the issue of damages. (*Sunkist Growers, Inc. et al., Appellants v. Winckler & Smith Citrus Products Co., et al., Appellees,* 284 F. 2d 1 (C.A. 9th, 1960), reh. den. 289 F. 2d 933.)

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[1]It is of interest that petitioner corporation had earlier filed in said District Court as Bankruptcy No. 45850 a petition for its reorganization under Chapter XI of the Bankruptcy Act, which proceedings resulted in an earlier reorganization of petitioner corporation in 1949.

Petitioners and respondents each petitioned for rehearing in the Court of Appeals which petitions were denied on May 5, 1961. (289 F. 2d 933.)

Respondents filed a petition for a writ of certiorari in this Court on the issue of liability, which petition was granted.

The matter was argued and resulted in a decision by this Court dated May 28, 1962 wherein the judgment of the Court of Appeals on the issue of liability was "reversed and remanded". (*Sunkist Growers, Inc. et al., Petitioners v. Winckler & Smith Citrus Products Co., et al.,* 370 U.S. 19, 8 L. Ed. 2d 305, 28 S. Ct. 1130, reh. den. 370 U.S. 965, 8 L. Ed. 2d 834, 82 S. Ct. 1577.)

The mandate from the Supreme Court filed in the District Court on August 20, 1962 and in the Court of Appeals on July 2, 1962 provided that respondents recover from petitioners the sum of $6,535.64 for their costs expended in this Court, which mandate was ordered spread on the records of the District Court, resulting in respondents having judgment in the District Court against petitioners for the sum of $6,535.64 for their costs incurred *in the Supreme Court.*

The petition of petitioners for writs of certiorari to this Court on the issue of damages was denied on June 2, 1962. (*Winckler & Smith Citrus Products Co. et al., v. Sunkist Growers, Inc., et al.,* 370 U.S. 917, 8 L. Ed. 2d 497, 82 S. Ct. 1552.)

Following receipt by the Court of Appeals of the mandate from this Court, respondents moved in the Court of Appeals to tax costs against petitioners and in favor of respondents for their costs incurred in the Court of Appeals, being costs as follows:

Docket fee in Court of Appeals	$ 25.00
Cost of printing the transcript of record on appeal	10,178.44
Cost of providing supersedeas bond in the amount of $2,000,000 for the period while the matter was on appeal to the Court of Appeals and to this Court in the amount of	150,776.18
Total	$160,979.62

Said motion was opposed by petitioners and briefs in opposition to the motion were filed on their behalf, and on August 22, 1962 the Court of Appeals rendered its opinion granting respondents' motion to tax costs in said sum of $160,979.62 (*Sunkist Growers, Inc. et al., Appellants v. Winckler & Smith Citrus Products Co., et al., Appellees,* 316 F. 2d 275.) Petitioners sought rehearing but such rehearing was denied by the Court of Appeals on November 27, 1962.

Respondents on September 5, 1962 filed in the District Court a motion for an order staying all further proceedings in the action until the taxable costs on appeal awarded by this Court and by the Court of Appeals, in the aggregate sum of $167,515.26 and interest thereon, had been paid or to provide security for the payment of such costs by way of an approved

surety bond. [Clk. Tr. Vol. 1, p. 4.] Said motion was supported by a memorandum of points and authorities in support thereof and by the affidavit of Ross C. Fisher, one of counsel for respondents since the inception of the action, in which affidavit it was pointed out that the action had then been pending for more than ten years, that respondents had been put to tremendous cost and expense (exceeding one-half million dollars) in defense of the action, that this Court had reversed the judgment obtained by petitioners on identical grounds urged by respondents since the inception of the action, that the Court of Appeals in reversing the judgment on the issue of damages had said, "We are completely satisfied that the cause of appellees' damages, as presented to the jury, rested upon surmise, conjecture, and guesswork, and that the amount found as damages was not logically or legally inferrable from the facts in evidence before the jury." (283 F. 2d 1, at p. 34); that in their petition for rehearing by the Court of Appeals petitioners had said at page 25 of their petition:

> "The Court, in effect, has ruled as a *matter of law* that appellees, on the evidence in the record, failed to establish any damage whatever. *Appellees introduced at the trial all of the evidence available to them on the issue of causation.* Since the Court apparently is of the opinion that such evidence is wholly insufficient to establish the fact or the amount of any item of damage, it is difficult to understand why the Court didn't enter judgment for appellants, rather than remand the case for further proceedings on damages. The remand will involve another extended trial by a bankrupt company, and

> the probability of another appeal, on the question of what is proper and adequate to establish *any* damage as well as the amount of any item of damage." (Italics ours.)

and that petitioners had thus conceded that in the former trial they had introduced all the evidence available to them on the issue of causation, and that in the light of the Court of Appeals decision on the issue of damages and this concession by petitioners, any re-trial would be vexatious and oppressive as to respondents; further, that respondents had evidence which they had not been permitted to introduce at the trial which the Court of Appeals had held was admissible on the issue of damages which would show that petitioner corporaton would come to the Court with unclean hands, and that he had been advised that petitioner corporation was without assets other than its purported cause of action,[2] and that in the light of said lack of assets and the pending bankruptcy proceedings of petitioner corporation respondents only practical remedy was to secure a stay order. This motion was resisted by petitioners and briefs were filed in their behalf and the matter was argued on three separate occasions before the District Court, namely on September 10, 1962 [Rep. Tr. Vol. 1, pp. 1-52] on November 5, 1962 [Rep. Tr. Vol. 1, pp. 53-83] and on December 3, 1962 [Rep. Tr. Vol. 1, pp. 84-112], and resulted in the District Court making its stay order on January 7, 1963 staying further proceed-

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[2]In oral argument in the Supreme Court on March 22, 1962 counsel for petitioners confirmed this. [Rep. Tr. No. 241 Supreme Court, October Term, 1961, pp. 18 and 22]; also at the hearing on respondents motion to dismiss [Rep. Tr. p. 117, lines 20-23; p. 139, line 7]; also confirmed by petitioners in their instant petition for certiorari at p. 5, lines 18-20.]

ings in the action until the costs of the appeal theretofore taxed and awarded respondent by this Court and by the Court of Appeals, in the aggregate sum of $167,515.26 and interest thereon had been paid, or until petitioners had furnished security for the payment of such costs by the securing of a surety bond approved by the District Court to secure payment of said costs and interest thereon. [Clk. Tr. Vol. 1, p. 38.]

Petitioners applied to the Court of Appeals for permission to appeal from the stay order under Sec. 1292(b) of 28 U.S.C.A. and Rule 38 of the Rules of the Court of Appeals for the Ninth Circuit. On March 11, 1963 the Court of Appeals denied such permission. [Clk. Tr. Vol. 1, p. 41.]

Petitioners also appealed to the Court of Appeals from the District Court's stay order by notice of appeal filed February 8, 1963. No steps were taken by them to perfect said appeal beyond the mere filing of the notice of appeal. Respondents moved in the Court of Appeals for the dismissal of the appeal. Petitioners did not oppose the said motion and on January 20, 1964 the Court of Appeals dismissed their said appeal from the stay order.

Respondents after a lapse of more than fourteen months following the making of the stay order and without there being any compliance with the stay order, on April 8, 1964 moved in the District Court for the dismissal of the main action under Rule 41(b) of 28 U.S.C.A. [Clk. Tr. Vol. 1, p. 44.] Said motion set forth the failure of petitioners to comply with the stay order either by payment of the costs on appeal or by giving security therefor; that the corporation was a corporation organized for profit, and that it and its cred-

itors and shareholders would be the ones to stand to profit by the action; that plaintiff corporation was in bankruptcy and was without assets other than the action itself, that the action caused respondents to expend large sums in defense of the action and that the re-trial of the action would necessarily cause respondents to expend further large sums in defense of the action, that to require a re-trial would be oppressive and burdensome to respondents and would impose an unwarranted burden upon them. Said motion was supported by a memorandum of points and authorities and by the affidavit of Ross C. Fisher, one of counsel for respondents. It pointed out the concession made by petitioners' counsel in their petition for rehearing by the Court of Appeals (pp. 6, 7, *supra*), that in the former trial petitioners had introduced all the evidence available to them on the issue of causation, that respondents had evidence that petitioner corporation during the time in question in the lawsuit had violated the Pure Food and Drug Act and regulations thereunder in that it had consistently adulterated its orange juice, which evidence respondents had not been permitted to introduce at the trial but which the Court of Appeals had held was admissible on the issue of damages, and which evidence would show that petitioner corporation would come to the court with unclean hands. [Clk. Tr. Vol. 1, p. 44.]

Petitioners resisted said motion. It was argued before the District Court on April 20, 1964 [Rep. Tr. Vol. 2, pp. 115-143]. During such argument the District Court clearly indicated that it considered the equities were on the side of respondents. [Rep. Tr. Vol. 2, p. 129, lines 13-16.] The District Court on its own volition asked to have read to it the concession made by

petitioners in their petition for rehearing before the Court of Appeals. [Rep. Tr. Vol. 2, p. 130, line 23, to p. 133, line 9.]

At the conclusion of the argument the District Court granted respondents' motion to dismiss and on May 7, 1964 made its findings of fact and conclusions of law [Clk. Tr. Vol. 1, p. 79] to which findings petitioners did not file exceptions. Among other findings the District Court made findings 8, 9 and 10, reading as follows:

> "8. More than twenty-two months have elapsed since the decision of the United States Supreme Court reversing and remanding the action, and more than fourteen months have elapsed since this court made and entered its stay order and plaintiff and intervener have made no payments whatsoever on the judgment for costs on appeal awarded defendants nor can they do so, nor will they do so, nor have they furnished security for the payment of such costs by the filing of any surety bond to secure the payment of said costs and interest thereon, nor can they do so nor will they do so.
>
> "Plaintiff and intervener have had ample time within which to pay said costs awarded defendants on appeal or to provide security for the payment of such costs and have not done so nor will they do so.
>
> "Said stay order has not been modified or vacated and at all times since its date has been and now is in full force and effect. No application for its modification or vacation has been made, and it would be inequitable for it to be modified or vacated.

"9. Plaintiff Winckler is a corporation organized for profit. It and its creditors and stockholders would alone benefit by the successful prosecution of this action. Defendants are non-profit, agricultural cooperatives. The action of plaintiffs in bringing this action caused defendants to necessarily expend large sums (in excess of one-half million dollars) in defense of the action. Plaintiff Winckler is currently in bankruptcy under Chapter X of the Bankruptcy Act, and was once before in bankruptcy under Chapter XI of the Bankruptcy Act. Plaintiff Winckler is without assets other than its alleged claims against defendants which are the subject matter of this action. Defendants are entitled to be paid the costs on appeal heretofore awarded them or to have such payment secured before any retrial of the action.

"10. Plaintiffs have asserted and admitted in the brief filed in the Circuit Court of Appeals that they introduced at the prior trial all the evidence available to them on the issue of causation (plaintiffs' (appellees') petition for rehearing in bank before Court of Appeals in Case No. 15242, p. 25). Upon any retrial plaintiff and intervener would have to establish not only the amount of damage suffered by them but also that such damages were proximately caused by defendants' action, a burden which this court finds from the Court of Appeals decision and plaintiff and intervener's previous admissions that they could not successfully overcome. To require defendants to retry the action would be inequitable, and would be oppressive and vexatious as to defendants, and would impose an unwarranted burden upon defendants." [Clk. Tr. Vol. 1, p. 79.]

The District Court made its judgment of dismissal of the action on May 7, 1964, and it was filed and entered May 8, 1964. [Clk. Tr. Vol. 1, p. 93.]

Petitioners filed notice of appeal in the District Court of their appeal to the Court of Appeals from said judgment of dismissal on June 5, 1964. [Clk. Tr. Vol. 1, p. 97.] Respondents opposed this. It was argued before the Court of Appeals May 5, 1965. The Court of Appeals affirmed the judgment of dismissal on June 4, 1965. [Clk. Tr. Vol. 1, pp. 110-115.] (*Winckler & Smith Citrus Products Co. et al., appellants v. Sunkist Growers, Inc. et al., appellees,* 346 F. 2d 1012, rehearing denied July 8, 1965.)

Notwithstanding their appeal from the judgment of dismissal and while their appeal was still pending, petitioners filed in this Court a motion for leave to file petitions for writs of mandamus to the Court of Appeals and to the District Court to set aside the Court of Appeals judgment awarding costs on appeal to respondents, to direct the District Court to set aside its stay order and its judgment of dismissal, and to set the case for trial. Petitioners' said motion for leave to file petition for writs of mandamus was denied by this Court on October 12, 1964. (*Winckler & Smith Citrus Products Co. et al., Petitioners v. United States Court of Appeals et al.,* No. 314 Misc. October Term 1964, 13 L. Ed. 2d Adv. Rep. p. 76.)

ARGUMENT.

I.

Certiorari Will Not Lie to Review Either the Stay Order or the Judgment of Dismissal as They Are Each Orders Which the District Court Had Jurisdiction to Make and May Not Be Set Aside in the Absence of a Finding of Gross Abuse of Discretion.

While Sec. 1254(1) of Title 28 U.S.C.A. provides that cases in the Court of Appeals may be reviewed by this Court by certiorari (28 U.S.C.A. Sec. 1254(1)), under the rules of this Court the instant petition does not present a proper case for a writ of certiorari to be invoked (Rule 19, Supreme Court Rules, 28 U.S.C.A., Rule 19.) All that is involved here is the question whether the District Court, acting upon a matter admittedly within its jurisdiction and discretion, abused that discretion. There is nothing of public consequence in such a question; but only a review of the facts upon which the discretion was exercised.

A review on writ of certiorari is not a matter of right, but of sound judicial discretion. The instant petition does not present a case "where the Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter" or has "so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision." (Rule 19 Supreme Court Rules, 28 U.S.C.A, Rule 19.)

The District Court had jurisdiction to make the stay order staying further proceedings until the costs of appeal had been paid or provided for.

Commercial Banking Corp. v. Martel, 44 Fed. Supp. 792 (D.C.N.Y. 1942);

14 Am. Jur., Costs, Sec. 90;

20 C.J.S., Costs, Pars. 426 and 427;

Weile v. Sturtevant (1917), 176 Cal. 767, 169 Pac. 685;

First National Bank v. Stansbury (1931), 214 Cal. 190, 5 P. 2d 11;

Sebolt v. National Bank of New Jersey (Superior Ct. N.J., 1949), 65 A. 2d 868.

See also and to similar effect where there was involved the staying of a second suit until the costs of a previously dismissed action were paid.

Weidenfeld v. Pacific Improvement Co. (C.A. 2d, 1939), 101 F. 2d 699, at p. 700;

Bankers Securities Corp. v. Ritz Carlton Restaurant & Hotel Co., 99 F. 2d 51, at p. 52 (C.A. 3d, 1938);

Miller v. Town of Suffield, 249 F. 2d 16 (C.A. 3d, 1957);

Kimble v. Western Union Tel. Co., 99 Fed. 892 (Cir. Ct. Pa., 1900);

Henderson v. Griffin, 5 Peters (U.S.) 151, 8 L. Ed. 79 (1831).

The latter being a situation no different in principle from the first as to being just as oppressive and vexatious. (See *Weile v. Sturtevant, supra,* 176 Cal. 767, at p. 770.)

Respondents' motion for dismissal of the action was made under Rule 41(b) of the Rules of Civil Procedure for failure of petitioners to prosecute or to comply with the stay order. The fact that petitioners sought to appeal from the District Court's stay order and did not see fit to prosecute the appeal and did not oppose respondents' motion for dismissal of the appeal indicates a lack of diligence in the prosecution of their purported claim against respondents.

That the District Court may dismiss an action for failure of plaintiffs to prosecute the action or to comply with the Federal Rules of Civil Procedure or with the orders of the court is shown by the following cases all of which were before the Court at the time the District Court granted respondents' motion to dismiss the action.

Rule 41(b), Federal Rules of Civil Procedure;

United States v. Pacific Fruit and Produce, 138 F. 2d 367 (C.A. 9th, 1943);

Russell v. Cunningham, 233 F. 2d 806 (C.A. 9th, Denman, 1956);

Boling v. United States, 231 F. 2d 926 (C.A. 9th, 1956);

Vaughn v. The First National Bank of Greenville, 218 F. 2d 804 (C.A. Miss., 1955); cert. den. 100 L. Ed. 759;

De Filippis v. Chrysler Sales Corp., 116 F. 2d 375 (C.A. 2d, 1940);

Shotkin v. Westinghouse Electric & Mfg. Co., 169 F. 2d 825 (C.A. 10th, 1948).

The determination to stay the proceedings and the judgment of dismissal each involved a fact determina-

tion made in the District Court's judicial discretion. Ordinarily the Supreme Court will not review a matter which involves a discretionary judgment of a lower court on a fact question particularly where the determination by the lower court has been affirmed by the Court of Appeals.

Houston Oil Company v. Goodrich, 245 U.S. 440;

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178.

This Court has said, ". . . This is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . ." We should "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations." (*NLRB v. Pittsburgh S.S. Company,* 340 U.S. 498, 503.) In short, "certiorari jurisdiction was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing . . ." (See *Magnum Import Co. v. Coty,* 262 U.S. 159, 163.)

Moreover, this Court should not grant certiorari as to the discretionary action of the District Court in making its stay order and its judgment of dismissal in the absence of a finding showing *gross* abuse of discretion by the District Court. It has been so held by the Court of Appeals for the Ninth Circuit as shown by *Russell v. Cunningham,* 233 F. 2d 806 (C.A. 9th, 1956); *United States v. Pacific Fruit and Product Co.,* 138 F. 2d 367 (C.A. 9th, 1943); *Hicks v. Bekins*

Moving & Storage Co., 115 F. 2d 406, at pp. 408, 409 (C.A. 9th, 1940).

The test is not whether this Court would have come to the same conclusion as did the District Court, it is rather whether the District Court so clearly abused its discretion in making the stay order and the judgment of dismissal that it was unreasonable and constituted an abuse of discretion. *Cf. Delno v. Market St. Ry. Co.*, 124 F. 2d 965, at p. 967 (C.A. 9th, 1942); *United States v. Copeland*, 295 F. 2d 635 (C.A. 4th, 1961), cert. den. 368 U.S. 955, 82 S. Ct. 398, 7 L. Ed. 2d 388.

In making the stay order and in dismissing the action we submit that the District Court was acting within its jurisdiction in the manner contemplated by Rule 41(b) of the Federal Rules of Civil Procedure and within its sound judicial discretion

II.

In Making the Stay Order and the Judgment of Dismissal of the Action the District Court Did Not Abuse Its Discretion.

We have shown above that the District Court had jurisdiction to make the stay order and the judgment of dismissal. No findings were made by the District Court in connection with its granting respondents' motion for the stay order as none were required. Rule 52(a) of the Federal Rules of Civil Procedure specifically provides that findings of fact and conclusions of law are unnecessary on decisions of motions of the character involved in respondents' motion for a stay order. (Fed. Rules of Civil Procedure, 28 U.S.C.A., Rule 52(a).) However, respondents' motion to dismiss under Federal Rules of Civil Procedure Rule 41(b) did re-

quire findings of fact and conclusions of law and they were made by the Court. [Clk. Tr. Vol. 1, p. 79.]

Three separate hearings were held before the court granted respondents' motion for the stay order, namely September 10, 1962 [Rep. Tr. Vol. 2, pp. 1-52], November 5, 1962 [Rep. Tr. Vol. 2, pp. 53-83] and on December 3, 1962 [Rep. Tr. Vol. 2, pp. 84-112], and they clearly indicate that the court did carefully consider the matter before making the stay order.

The matter of petitioners' concession to the Court of Appeals was called to the District Court's attention in respondents' motion for the stay order and was extensively referred to by petitioners' counsel before the stay order was made. [Rep. Tr. Vol. 2, p. 42, lines 18-24; p. 82, lines 23-24.] Despite the representation made by petitioners in their instant petition that their concession was retracted before the District Court, we submit that there was no such retraction. [Rep. Tr. Vol. 2, p. 48.] Moreover, the concession was made in a brief filed by petitioners in the Court of Appeals and was no idle gesture. It conceded that at the former trial petitioners had introduced all of the evidence available to them on the issue of causation. This concession was solemnly made to the Court of Appeals and the District Court was entitled to rely on it and take it into consideration in considering whether it would make the stay order. It is significant that petitioners' counsel did not outline to the Court what additional evidence they would propose to offer on a retrial. Petitioners in their petition at page 8, lines 26-29, refer to the fact that the District Court did not "inquire of counsel for the appellants whether they did have additional evidence". We submit that if there were such additional evidence

it was incumbent upon petitioners to indicate the nature of such evidence and to formally ask leave of court to retract the concession made to the Court of Appeals.

Moreover, the remarks of the District Court during the course of the arguments clearly indicate that the District Court in making the stay order was not basing its determination solely on this concession but that the Court also had in mind the decision of the Court of Appeals itself, indicating that on any retrial petitioners would have to establish not only the amount of damage suffered by them but also that such damages were proximately caused by respondents' actions (284 F. 2d 1 at pp. 32-34). For example, the District Court said, "They (respondents) raise some rather serious questions as to the amount of damages". [Rep. Tr. Vol. 2, p. 62, lines 14-15.] Again the Court said, "I am thinking about the equity on the other side. Now here is a case that comes back down, first the Supreme Court reverses it, secondly the Court of Appeals for the Ninth Circuit raises some serious questions on the amount of damages, at least that is the way I interpret it." [Rep. Tr. Vol. 2, p. 65, lines 16-22.] Later the Court said, "Well, as I said though, counsel, the language (referring to the Court of Appeals decision) raises some serious question on the damage situation." [Rep. Tr. Vol. 2, p. 82, lines 6-8.] Again the Court said, "Yes, but you have got some other problems there by reason of the Circuit Court decision." [Rep. Tr. Vol. 2, p. 94, lines 6-7.]

Thus the Court in making its stay order had in mind and considered the improbability of a successful outcome for petitioners upon a retrial, and that is obviously a significant element in determining whether it would

be fair and equitable to put respondents to great and unreasonable expense in addition to that to which they had already been put in order that petitioners might pursue a cause, in the light of petitioners concession and the law of the case established by the Court of Appeals, which would in all probability result in petitioners not prevailing upon a retrial. That the District Court gave careful consideration to the matter and weighed the equities both for and against the granting of the stay order is shown by the Court's remarks that he was weighing the equities in granting the stay order. [See Rep. Tr. Vol. 2, p. 97, lines 9-12.]

Respondents' motion to dismiss the action was not made until more than fourteen months after the District Court had made its stay order and without there being any compliance with the stay order meanwhile. In respondents' motion to dismiss the action respondents by the affidavit of Ross C. Fisher attached thereto again called the attention of the District Court to the concession above referred to made by petitioners' counsel in their petition for rehearing by the Court of Appeals and quoted verbatim the wording of such concession. [See Clk. Tr. Vol. 1, p. 44] and asserted that in the light of the Court of Appeals' decision on the issue of damages and said concession that any retrial would necessarily be vexatious and oppressive as to respondents. Thus the concession was called to the attention of the District Court at the time of the hearing on respondents' motion to dismiss. That the Court had this concession in mind and took it into account is shown by the fact that the Court requested respondents' counsel to read the concession, which counsel did. [Rep. Tr. Vol. 2, p. 132, lines 8-25.]

In addition respondents had pointed out in their motion to dismiss the action the lack of assets of the petitioner corporation; that respondents were entitled to their costs on appeal theretofore awarded them regardless of the final outcome of the action; and that respondents "should not be required to be subjected to the harassment of this action when plaintiff and intervener (petitioners) have not paid the costs awarded defendants (respondents) in connection with plaintiffs' (petitioners) unsuccessful appeal"; that petitioners had ample time within which to pay such costs or provide security for the payment thereof: that petitioner corporation is a corporation organized for profit; it and its stockholders and creditors would alone benefit by any recovery that might eventuate in case of a retrial; that to require respondents to stand retrial without petitioners first paying the costs of the former appeal awarded respondents or having provided security for such payment, would be vexatious, oppressive and burdensome to respondents. [Clk. Tr. Vol. 2, p. 44.]

Respondents had further pointed out that they had evidence that petitioner corporation during the time in question in the lawsuit had violated the Pure Food and Drug Act and regulations thereunder in that it had consistently adulterated its orange juice; that respondents were not permitted to introduce this in evidence at the first trial; that the Court of Appeals in its decision held that such evidence of adulteration was admissible on the issue of damages (284 F. 2d 1 at pp. 29, 30); that such evidence would establish that petitioner corporation would come to this Court with unclean hands.[3] [Clk. Tr. Vol. 2, p. 44.]

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[3]Such evidence of adulteration would establish that petitioners would come to the Court with unclean hands. (*Carolene Products*

When the Court made its findings on the motion for dismissal, in said findings, particularly finding 10, the Court specifically found that plaintiffs (petitioners) have asserted and admitted in the brief filed in the Court of Appeals that they introduced at the prior trial all the evidence available to them on the issue of causation; that upon any retrial petitioners would have to establish not only the amount of damage suffered by them but also that such damages were proximately caused by respondents' action, "a burden which this Court finds from the Court of Appeals' decision and from plaintiff and intervener's (petitioners') previous admissions that they could not successfully overcome." [Clk. Tr. Vol. 1, p. 79.] The Court then found that to require respondents to retry the action would be inequitable and would be oppressive and vexatious as to respondents and would impose an unwarranted burden upon respondents. [Clk. Tr. Vol. 1, p. 79.]

Thus the Court specifically made a determination by way of a finding that to permit a retrial would be vexatious and oppressive and burdensome to respondents.

Regardless of anything that a trial judge may have said from the bench during a proceeding and before a definitive decision "the trial judge speaks to the reviewing court through one means only, *i.e., through his findings and judgment.*" (*Pacific Portland Cem. Co. v. Food Machinery & Chemical Corp.* (9th Cir.), 178 F. 2d 541, 548 (Court's emphasis).) Neither such random expressions nor even an opinion can be used "for

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Co. v. Evaporated Milk Assn., 93 F. 2d 202, 203 (C.A. 7th, 1938); *Maltz v. Sax*, 134 F. 2d 2, at pp. 4 and 5 (C.A. 7th, 1943) cert. den. 319 U.S. 772; *Proper v. John Bene & Sons, Inc.* (E.D. N.Y., 1924), 299 Fed. 863 at 865, 866).)

the purpose of modifying or controlling the finding . . ." (*Pacific S. Metal Works v. California Canneries Co.* (9th Cir.), 164 Fed. 980, 984) or "to impeach the decree . . ." (*Isaacs v. De Hon,* 11 F. 2d 943, 944.)

It is clear that the judge's comments, however inartfully phrased, were intended to mean that in balancing the equities he took into consideration the probability or improbability of petitioners' success and the burden or harassment to respondents that would follow from a second trial, for he said that the Winckler stockholders "must not think too strongly of the case . . ." [Rep. Tr. Vol. 2, p. 66, lines 19-20] and that while he "wasn't thinking of anything in the sense of being vexatious (he was) thinking in the sense of the costs that had been granted them and if you (petitioners) lose the next time they (respondents) have no hope of recovering the costs. They have some equity on their side, so they are entitled to say, well here, if you are going forward then pay us our costs and then proceed." [Rep. Tr. Vol. 2, p. 67, lines 6-13.] Other comments were consistent with the view that the equities were weighed. [Rep. Tr. Vol. 2, p. 90, lines 3-21; p. 102, line 25, to p. 103, line 14.]

At the time the dismissal was ordered the District Court's comments were consistent with the view that its decision was based upon the weighing of the equities which preponderated in respondents' favor. [Rep. Tr. Vol. 2, p. 117, line 12, to p. 118, line 5; p. 121, lines 6-20; p. 126, lines 18-21; p. 128, line 25, to p. 129, line 16; p. 130, line 23, to p. 133, line 14; p. 138, line 21, to p. 143, line 21.]

Thus in making its judgment of dismissal the District Court (based not only upon the concession made

by petitioners in the Court of Appeals but also upon his examination of the Court of Appeals' decision), found that petitioners would on any retrial have a burden "that they could not successfully overcome" [Find. 10, Clk. Tr. Vol. 1, p. 79] and that "to require defendants (respondents) to retry the action would be inequitable and would be oppressive and vexatious as to defendants, and would impose an unwarranted burden upon defendants." [Clk. Tr. Vol. 1, p. 79.] This, the Court of Appeals recognized by affirming the judgment of dismissal. [Clk. Tr. Vol. 1, pp. 110-115.] (*Winckler & Smith Citrus Products Co. v. Sunkist Growers, Inc.*, 346 F. 2d 1012.)

III.

Respondents' Judgments for Costs on Appeal Awarded by This Court and by the Court of Appeals Were Made in the Exercise of Their Respective Jurisdictions and Have Become Final and Should Not Be Disturbed.

The mandate of this Court, issued May 28, 1962, awarded costs to respondents in the sum of $6,535.64 for their costs "*herein expended*" in conformity with Rule 57 of the Supreme Court (28 U.S.C.A. Rule 57). The judgment for costs awarded by the Court of Appeals awarded costs to respondents in the amount of $160,979.62. They were both costs incurred by respondents incident to their successful appeal to this Court.

The rule is that the awarding of costs on appeal and any judgment thereon is not dependent upon the outcome of a retrial and is wholly independent thereof. *Land Oberoesterreich v. Gude*, 93 F. 2d 292 (C.A. 2d), wherein Judge Hand stated, at page 293, that costs on appeal ". . . do not abide the event like other

costs unconnected with the appeal, but are presently taxable and payable after the order of reversal."

Jennings v. Burton, 177 Fed. 603 (C.C.S.D. N.Y.);

First National Bank v. Stansbury, 214 Cal. 190, 5 P. 2d 11.

wherein the Court said, at page 192, "There is no interdependence between the judgment for costs of the former appeal and any judgment which may subsequently be entered in the main case."

Meserve v. Superior Court, 2 Cal. App. 2d 468 (1934), 38 P. 2d 453;

Weile v. Sturtevant, 176 Cal. 767, at p. 770 (1917), 169 Pac. 685;

14 Am. Jur., Costs, Suppl. §93.

It is not the practice or rule to make costs allowed upon a reversal abide the event of the further proceedings in the court below. Rather such costs are taxable and recoverable immediately upon the issuance of the mandate.

Jennings v. Burton, supra, 177 Fed. 603;

Broffe v. Horton, 173 F. 2d 565 (2d Cir.);

Land Oberoesterreich v. Gude, supra, 93 F. 2d 293;

Berthold v. Burton, 169 Fed. 495.

All of the costs applied for by respondents in the Court of Appeals and awarded by the Court of Appeals were costs incurred by respondents in connection with their appeal.

In the Court of Appeals petitioners made the same argument which they have made in their petition for a

writ of certiorari. The Court of Appeals, we submit, properly determined that it had jurisdiction to award the costs on appeal, and that under the mandate of the Supreme Court it was bound to allow such costs since that mandate provided that the judgment of the Court of Appeals had been "reversed with costs". (*Sunkist Growers, Inc. et al. v. Winckler & Smith Citrus Products Co. et al.*, 316 F. 2d 275 at 276.)

When a judgment has been reversed with costs it is competent for the court below to allow or tax costs on appeal, and the costs so allowed or taxed may be for items or amounts in addition to those specified in the mandate. (See *e.g. Land Oberoesterreich v. Gude, supra*, 93 F. 2d 293; *Bartels v. Redfield*, 47 Fed. 708; *In re Northern Indiana Oil Co., supra*, 192 F. 2d at p. 142; *Columbia Motor Car Co. v. Duerr & Co.*, 184 Fed. at 916.)

It follows that since the judgment was reversed by the Supreme Court "with costs" and since it was the judgment of the Court of Appeals that was so reversed, it was competent for the Court of Appeals to have taxed the costs in question. The Court of Appeals therefore correctly interpreted the mandate in its order on costs dated August 27, 1962, and such direction would carry down any contrary language in the decision of the Court of Appeals of September 30, 1962.

Further, even if the Supreme Court had not mentioned the costs, in *Bartels v. Redfield, supra*, 47 Fed. 708, it was held that there was power in the Circuit Court to allow the costs previously incurred in that court. That was precisely what the Court of Appeals did in its order on costs dated August 27, 1962.

The contention that the Court of Appeals misinterpreted this Court's mandate is an untenable one. The issue of costs in the Court of Appeals was dependent upon this Court's mandate in only one respect. In that respect no interpretation was required and no result contrary to the mandate was reached. After a reversal in this Court the Court of Appeals may award costs on appeal without specific authority in the mandate so to do, for in case of a reversal the petitioner is allowed costs "unless otherwise ordered by the Court". (28 U.S.C.A., Rule 57, subd. 2.) There cannot be the slightest doubt that costs were not "otherwise ordered" by the mandate with which we are concerned here. The Court of Appeals obviously read the mandate and its reading was accurate.

From the above it is apparent that the Court of Appeals not only had jurisdiction to allow respondents the costs on appeal, but also that it correctly interpreted this Court's opinion and mandate.

It is further apparent that said judgment for costs on appeal has long since become final. While petitioners sought rehearing from said judgment for costs on appeal and it was denied, they did not seasonably seek review of said decision of the Court of Appeals. True they did in their petition for a writ of mandate seek to have this Court set aside said judgment for costs, but this Court denied said petition for a writ of mandate on October 12, 1964 (No. 314 Misc. Oct. Term, 1964, *Winckler & Smith Citrus Products Co. et al. v. U. S. Court of Appeals, et al.*, 13 L. Ed. 2d 76). Not content, petitioners again raise the point in their instant petition for certiorari. It is submitted that said judgment for costs on appeal has long since become final and may not be disturbed.

Conclusion.

It is submitted that petitioners' petition for a writ of certiorari should not be granted, that the District Court had jurisdiction to make its stay order and judgment of dismissal, and that in so doing it did not abuse its judicial discretion, and further, that the judgments for costs on appeal awarded respondents both by this Court and by the Court of Appeals have become final and should not be disturbed.

Respectfully submitted,

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